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December 15, 1998

Chairman William E. Kennard
Federal Communications Commission
1919 M Street, N.W.
Washington, DC 20554

Re: *In the Matter of Applications for Consent to the Transfer of Control of Licenses Section 214 Authorizations from Ameritech Corporation, Transferor, to SBC Communications Inc., Transferee*, CC Docket No. 98-141

Dear Chairman Kennard,

In light of an exchange that occurred yesterday during the Commission's *en banc* hearing in the above-captioned proceeding, Covad would like to inform the Commission of some of its experiences in California.[1] A recent ruling by an independent arbitration panel clearly demonstrates SBC, through its Pacific Bell subsidiary, has not fully implemented the 1996 Act and market opening Commission rules.

In particular, the arbitration panel found that SBC had violated its obligation of good faith and fair dealing in a "fundamental and pervasive way" with regard to Covad's physical collocation arrangements in California.[2] Covad instituted this arbitration pursuant to a mandatory arbitration clause in its interconnection agreement, based upon

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1 In particular, Covad refers to this exchange between you and SBC witness Mr. Stephen M. Carter:

Chairman Kennard: "Can you tell us today that SBC has complied with the rules and regulations of this Commission implementing the marketing opening provisions of the 96 Act, in particular sections 251 and 252 . . . ?"

Mr. Carter: "I can state unequivocally that I believe our company has done as much or more than any other to open up our markets. . . . I can't think of any issue at the moment where we're out of step. We're in disagreement, but not out of line with your orders, or indeed any state orders."

2 *In re the Arbitration of Covad Communications Company and Pacific Bell*, Case No. 74 Y181 0313 09, Interim Opinion with Respect to Covad's Claims for Breach of the Interconnection Agreement and Injunction (Am. Arbit. Ass". Nov. 24, 1998) (Covad/SBC Arbitration Order) (attached).

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Pacific Bell's breach of its contractual obligations and violations of the Communications Act. After discovery and a hearing, the panel agreed, ruling that Pacific Bell's conduct "has deprived Covad of the benefits of its bargain" in its interconnection agreement.[3]

While Mr. Carter may not have been aware of the Covad arbitration ruling while testifying, his statements continue a pattern that began with SBC's original application in this proceeding and which stands in marked contrast to the arbitration panel's findings—

July 20, 1998 Affidavit of Mr. Carter	**Covad/Pacific Bell Arbitration Panel**
"SBC is committed from the highest levels of our company to open our local networks in compliance with the 1996 Act and thus facilitate market entry by other local service providers." ¶ 4	"Pacific did not act in good faith in its assessment of collocation space available for Covad. . . . Pacific has breached its obligation of good faith performance in a more fundamental and pervasive way." ¶¶ 11, 17.
"SBC is providing local wholesale customers a meaningful opportunity to compete and is providing items in a non-discriminatory manner." ¶ 21.	"[Because of Pacific's conduct,] Covad has been delayed at least a year in establishing its facilities." ¶ 16.
"Our local wholesale handbooks, workshops, classes, and reference materials are continually evolving to ensure that all of our local wholesale customers have timely and accurate resources to implement their interconnection and resale agreements and begin providing services to their end users." Attachment 4 at 2-3.	"By the end of 1997, Covad made requests for training on how to order the circuits. Training was finally made available, after 'escalation', but the problem of delivery of inoperable circuits persisted." ¶ 19.
"Pacific Bell therefore has taken extraordinary steps to expand the space available for collocation use, steps beyond what we believe the Act requires." Attachment 5 at 2.	"Pacific remains the sole arbiter of whether physical collocation space is available in a particular CO. There is no mechanism for Covad to test Pacific's decisions and to be assured that it will be afforded space, according to its priority of application, where space is available. . . . On the record here, that is not a tolerable situation." ¶ 28.
"In offices where space was unavailable, Pacific Bell created new space for CLECs' use through such steps as removing non-functioning equipment, relocating administrative offices, and offering common collocation." Attachment 5 at 2.	"Pacific has guidelines for finding space for collocation, promulgated in 1993 and revised in 1998. However, by its own admission, the guidelines have been followed inconsistently or not at all. In a memorandum dated April 20, 1998, a Pacific employee responsible for making recommendations on collocation requests wrote: 'We have never seen the collocation guidelines, regarding how much space we can reserve for our own use, in writing." Arbitration Ruling at ¶ 15.
"Pacific Bell has offered other innovative solutions which eliminates [sic] the need for physical or virtual collocation offering, instead to run lines from the central office to a CLEC's selected location in a neighboring building." Attachment 5 at 3.	"When Covad proposed collocation through the use of CEVs, Pacific rejected the proposal, but has recently reversed itself. These failures of Pacific to follow the dictates of good faith performance in the Agreement exacerbated the harm to Covad from Pacific's nonperformance." ¶ 17.

[3] Covad/SBC Arbitration Order at ¶ 16.

SBC's compliance with the Communications Act, as amended by the Telecommunications Act of 1996, and the Commission's implementing regulations is clearly a critical aspect of the Commission's examination of the proposed transaction. Covad believes that the arbitration panel's findings deserve significant weight because those findings were made after documentary discovery and a week of hearings in which Covad and SBC witnesses were subject to the rigors of cross-examination. At a minimum, the arbitration panel's decision and the evidence uncovered by that proceeding raise substantial questions of material fact related to SBC's compliance with the Act and Commission rules in California. As a result, the Commission should act pursuant to its statutory mandate and rules.

SBC has argued many times—to this Commission and state commissions—that the "California experience" is relevant to this proposed transaction.[4] Covad agrees—but Covad's "California experience" is very different than what SBC wants the Commission and the Department of Justice to believe. I thank you for your attention to this matter and for your commitment in ensuring that the Commission's public interest obligation is fulfilled.

Sincerely,

Thomas M. Koutsky
Assistant General Counsel
Phone: (703) 734-3870
Fax: (703) 734-5474

Attachment
cc: Hon. Susan Ness
Hon. Harold Furchtgott-Roth
Hon. Michael Powell
Hon. Gloria Tristani
Hon. Joel Klein, U.S. Department of Justice
Hon. Larry Irving, NTIA
Magalie Roman Salas, Secretary, FCC (orig. and two copies)
Larry Strickling, Chief, FCC Common Carrier Bureau
Kelly K. Levy, NTIA Office of Policy Analysis and Development

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[4] For example, in its original application, SBC states: "Since the merger [with SBC], Pacific Bell has continued to open its local markets to competition . . . . The evidence is clear that competition in California has been promoted, not impeded, since SBC merged with PacTel. . . . SBC lived up to the commitments and promises it made related to the SBC-PacTel merger and this positive track record bodes well for the commitments and promises SBC has made regarding the SBC-Ameritech merger." Kahan Aff. at ¶ 102-03.

AMERICAN ARBITRATION ASSOCIATION

In Re the Arbitration of:	)	**Case No. 74 Y181 0313 98**
	)	
COVAD COMMUNICATIONS COMPANY, Claimant	)	
	)	
and	)	**Interim Opinion With Respect To Covad's Claims For Breach Of The Interconnection Agreement And Injunction**
	)	
PACIFIC BELL, Respondent	)	
	)	

WE, THE UNDERSIGNED ARBITRATORS, having been designated in accordance with the Arbitration Agreement entered into by the above-named parties dated April 21, 1997, and having been duly sworn and having duly heard and examined the submissions, proofs and allegations of the Parties, Find, and conclude, with respect to Covad's claims for breach of the Interconnection Agreement as follows:

JURISDICTION

1. **The arbitrators' jurisdiction is based on the Interconnection Agreement between Covad Communications Company ("Covad") and Pacific Bell ("Pacific") dated April 21, 1997 ("the Agreement"). The Agreement provides (in relevant part) in Section 18:**

> **18.1 Any controversy or claims arising out of or relating to [the] Agreement or any breach hereof, shall be settled by arbitration in accord with the Commercial Arbitration Rules of the American Arbitration Association ("AAA"). . . .**
>
> **18.2 The AAA panel shall award costs, including reasonable attorney's fees, to the successful Party at the conclusion of the hearing. Should any party refuse to arbitrate controversies or claims as required by this Agreement, or delays the course of arbitration proceedings beyond the times set, or permitted by the AAA panel, then such Party shall pay all costs, including reasonable attorney fees, of the other Party, incurred with respect to the entire arbitration and or litigation process, even though such refusing or delaying Party may ultimately be the successful Party in the arbitration and/or litigation.**
>
> **18.3 The judgment upon the award rendered may be entered in the highest Court of the forum capable of rendering such judgment, either State or Federal, having jurisdiction and shall be deemed final and binding on both of the Parties.**

THE AGREEMENT

2. The Agreement is integrated (Section 22) and is not ambiguous. It is governed by California law and the Telecommunications Act. The Agreement recites that it is "intended to promote independent, facilities-based local exchange competition by encouraging the rapid and efficient interconnection of competing local exchange service networks." It also recites that the parties "seek to accomplish interconnection in a technically and economically efficient manner in accordance with all requirements of the Telecommunications Act of 1996."

3. The Agreement is the direct result of the Telecommunications Act ("the Act"), which was intended to promote competition in all telecommunications markets. The legislation requires incumbent local exchange carriers such as Pacific ("ILECs") to offer competitive local exchange carriers such as Covad ("CLECs") access to their local telecommunications network by providing interconnection, unbundled network elements, and the opportunity to purchase wholesale the services ILECs offer to retail customers. Covad contracted for interconnection through collocation, and for transport and loops.

COVAD'S CLAIMS

4. Covad claims that Pacific has breached its contractual obligations with respect to collocation by:

(1) Denying Covad's requests for physical collocation and offering instead virtual collocation, without a demonstration by Pacific and a determination by the CPUC that "physical collocation is not practical for technical reasons or because of space limitations." Section 11.5.
(2) Denying collocation space in numerous COs where, in fact, space for physical collocation existed.
(3) Failing to provide physical collocation, in these locations where Pacific offered it, in a timely, workable manner.
(4) Failing to provide loops and transport in a timely, workable manner, missing many loop and transport deadlines.

5. Covad claims that Pacific has breached its contractual obligations with respect to the express and implied covenants of good faith and fair dealing in connection with its practices in providing physical collocation.

6. Covad claims that Pacific has violated its statutory duty under the Telecommunications Act and the corresponding FCC regulations by:

(1) Failing to provide for physical collocation of equipment necessary for interconnection.
(2) Failing to negotiate in good faith by its unjustified insistence on caged physical collocation and by its failure to cooperate to resolve its alleged interconnection space limitations.

(3) Failing to provide collocation and interconnection on "just, reasonable and nondiscriminatory terms."

7. In addition to damages for the alleged breaches, Covad seeks injunctive relief.

FINDINGS AND CONCLUSIONS WITH RESPECT TO PERFORMANCE AND BREACH

Breach of Contract

8. No matter whose performance statistics are accepted, Covad's or Pacific's, it is apparent that Pacific breached the Agreement with respect to the provision of collocation services. Pacific admits as much. There is no dispute that of 18 cages scheduled for delivery to Covad in February 1998, 15 were delivered late. At least 35 out of a total of 77 completed collocation cages have been delivered an average of 35 days beyond the 120-day interval mandated by tariff. [Ex. 45] As Pacific acknowledges, the 120-day interval is not optional. [Ex. 144] Furthermore, no cage actually operates when it is turned over; rather, the turnover date merely signals that Pacific will accept orders for transport, with a delivery date of up to 19 business days. (A delivered circuit, moreover, is not necessarily an operational circuit. Even a non-operational circuit that is in place within the agreed upon interval is counted by Pacific as delivered on time.) Although there is disagreement about the exact number, by either parties' count, somewhere between 200 and 570 circuits have been delivered late or inoperable through failures of Pacific. [Ex. 269]

9. Pacific also breached its duty, mandated in the Act and reflected in the Agreement, to demonstrate that, where it so contends, physical collocation is not practical for technical reasons or because of space limitations, and to obtain a determination of that status from the CPUC, before offering virtual collocation. [47 USCA 251 (c) (6); Section 11.5]

Good Faith Performance and Fair Dealing

10. The Agreement contains an express covenant of good faith. Section 34 provides:

> In the performance of their obligations under this Agreement, the Parties shall act in good faith and consistently with the intent of the Act. Where notice, approval or similar action by a Party is permitted or required by any provision of this Agreement (including, without limitation of the obligation of the Parties to further negotiate the resolution of new or open issues under this Agreement), such action shall not be unreasonably delayed, withheld or conditioned.

In addition, under the implied covenant of good faith and fair dealing, neither party may act to deprive the other of the benefits it has bargained for under the Agreement. Pacific breached its obligation of good faith performance and fair dealing.

11. Pacific did not act in good faith in its assessment of collocation space available for Covad. Pacific denied physical collocation in approximately 50 of 150 Central Offices ("COs") requested by Covad. Early in the relationship Covad sought additional detail regarding a series of summary denials and the possibilities of later availability of space at the denied locations. [Ex. 180] Pacific responded by refusing to provide any additional information and representing that "the space determinations were made only after careful evaluation of the available space in the individual central offices." [Ex. 170] However, in April 1998 Pacific "resurveyed" its offices and changed the status of 54 of 82 resurveyed COs. Previous denials, apparently based on "careful evaluation," were summarily reversed. [Ex. 41] Thus, for instance, of five COs requested for collocation by Covad and denied "due to no space being available" in November 1997, all but one were found to have space for physical collocation—some, even by Pacific's reckoning, with space for up to five collocation cages. [Ex. 166; Ex. 41]

12. Covad ranked COs according to their demographic importance for collocation in carrying out its business plan. Menlo Park 11 ranked eighth and was included on the first list of requests for collocation submitted by Covad. Pacific denied Covad physical collocation in Menlo Park "due to no space available" in its November 1997 notice. [Haas; Ex. 166] In the April resurvey communication, Pacific still listed the Menlo Park 11 CO as "exhausted." [Ex. 127; Ex. 104]

13. As a part of the arbitration discovery process, the parties agreed that Covad would be allowed inspection of Menlo Park 11. (Pacific expressed satisfaction that the Menlo Park CO had been chosen for inspection, asserting through its attorney that it was a good example.) As recently as August 28, 1998, Pacific represented to Covad that there was "no space" in Menlo Park 11. [Ex. 61 at C18747] The inspection proceeded in the week before the arbitration. Pacific announced in its opening statement that space for collocation had been found at Menlo Park 11, and Covad would be offered physical collation at that CO.

14. Photographs, the floor plan, and testimony from both Pacific and Covad witnesses demonstrated unequivocally that Menlo Park 11 had ample space for several cages (although the witnesses did not agree on the number.) [Exs. 6-11]

15. Pacific has guidelines for finding space for collocation, promulgated in 1993 and revised in 1998. [Ex. 153] However, by its own admission, the guidelines have been followed inconsistently or not at all. In a memorandum dated April 20, 1998, a Pacific employee responsible for making recommendations on collocation requests wrote: "We have never seen the collocation guidelines, regarding how much space we can reserve for our own use, in writing." The recommendation made by the employee is perhaps more telling:

> I recommend that we deny this collocation request. I don't think it was ever the intent of collocation to trigger us to build brand new central office just because we gave up all our growth space to collocation cages. If we are obliged to build collocation cages, I suggest that we first develop an [sic] plan for serving this

area, which could involve many alternative solutions and take 2-3 years to implement. [Ex. 69]

16. Menlo Park 11 is not an isolated incident. Since the hearing, space has apparently been found in several more COs; five were among the COs Pacific claimed had "no space" in August 1998. [Ex. 61] Pacific's conduct in finding space for collocation has deprived Covad of the benefits of its bargain. Covad was an early adopter of the opportunities offered by the Act. Having entered into the first non-arbitrated agreement with Pacific [Ex. 225], and having jumped through the procedural hoops necessary to apply for collation (including the completion of Pacific's multi-page form [Ex. 68]), Covad had a reasonable expectation that where space was available, it would be on its way in the process of building its business. It could offer its customers (corporations and ISPs) and their clients (end users) high speed digital communications with wide local coverage. Instead, where space was initially denied, but later allowed, Covad has been delayed at least a year in establishing its facilities. [Haas, Rugo, Khanna]

17. Pacific has breached its obligation of good faith performance in a more fundamental and pervasive way. Throughout the Agreement, as well as in Section 23, continuing cooperation and negotiation are contemplated to resolve ongoing issues. [See, for example, Sections 18, 1.10, 1.12.1, 1.14] Covad made several attempts to forestall or resolve obvious problems through communications at upper levels of management. Mr. McMinn's letter of August 28, 1997, for instance, raises several issues, including delayed delivery and line ordering procedures. [Ex. 176; see also Exs. 177, 179, 180] Covad called a high level meeting on December 17, 1997, to discuss its concerns about timely delivery of cages, among other things. Pacific's responses, almost without exception, defended Pacific's practices, provided reassurances of performance, or denied there were problems. [Exs. 170, 177, 207; Stanley] In many cases Pacific's reassurances were patently unfounded, as when Pacific defended its space decisions as carefully evaluated or committed, in December 1997, to on-time delivery of cages. When Covad proposed collocation through the use of CEVs, Pacific rejected the proposal, but has recently reversed itself. [Ex. 207] These failures of Pacific to follow the dictates of good faith performance in the Agreement exacerbated the harm to Covad from Pacific's non-performance.

18. The problems with ordering circuits based on the Paragraph 4 definition offer an example. That ordering problems were possible, if not likely, is evident from Mr. McMinn's letter, as well as from various regulatory agency discussions. [Ex. 35, paragraphs 157-58; Ex 33, at 24-25, 102] The recognized problem is that while the ILEC understands its facilities, the CLEC understands the needs of its own technology. Those two understanding must come together to assure that the CLEC will be able to order facilities that work with its particular technology. Mr. McMinn offered a solution in August 1997 that has since been recommended by at least one agency and is now apparently being considered by Pacific.

19. Mr. McMinn's suggestion was rejected by Pacific, but no workable alternative was offered in its place. By the end of 1997, Covad made requests for training on how to

order the circuits. Training was finally made available, after "escalation", but the problem of delivery of inoperable circuits persisted. [Rugo] Another meeting was convened in June 1998, and the parties agreed on a solution that turned out to be no solution at all: Covad put the designation "DSL—no electronics" on its orders in the "Remarks" column. Pacific, with ready knowledge of the actual length of a loop (rather than Covad's "driving distance" estimate), in some cases filled Covad's "DSL—no electronics" orders with dry lines over 17,000 feet long—lines Pacific knew would probably not operate and would not be assigned in providing its own retail services. [Ex. 229; Boggs] Pacific faults Covad's reluctance to tell Pacific what specific applications were being ordered, but as Covad points out, Covad had no incentive to order an incorrect circuit. On the other hand, Pacific may have had less than a strong incentive to correct the problems: it was rolling out a competitive service during 1998.

Claims Under the Telecommunications Act

20. Covad's claims are addressed in the separate Interim Opinion With Respect to Covad's Telecommunications Act Claims.

PACIFIC'S DEFENSES

Commercial Reasonability and Force Majeure

21. Pacific points to "unprecedented and unforeseen growth in demand" as the basis for two of its defenses. Given such demand, it argues, its performance was either "commercially reasonable" or excused under the force majeure provision of the Agreement, Section 19. Pacific failed to prove that the demand resulting from the Act, while it may have been unprecedented, was unforeseen. Even if it had carried its burden on that issue, its legal argument would fail. While demonstrably commercially reasonable conduct might carry evidentiary weight in a determination whether a party has complied with the duty of good faith and fair dealing, it is not a cognizable defense to breach of contract. Pacific's proposed interpretation of the events triggering the force majeure clause is not legally supported, but even if it were, Pacific did not give timely notice that its performance was being interfered with by events beyond its control as required by Section 19.

Limitation of Liability With Respect To Contract Claims

22. The limitation of liability, Section 26, excludes "indirect, incidental, consequential, special damages, including (without limitation) damages for lost profits, regardless of the form of action, whether in contract, indemnity, warranty, strict liability, or tort." Pacific has cited numerous UCC cases to illustrate that the types of damages sought by Covad, for instance, extra material and labor costs associated with obtaining operational equipment, fall into the prohibited categories. The UCC definitions do not apply here, even by analogy. The type of damages contemplated by the UCC as direct damages is non-existent in this context. The UCC provides direct damages for the difference between the value of what was contracted for and the value of what was

delivered, or for cover. The value of Pacific's services, when they are finally delivered, is no different than the value as contracted for, unless lost profits, prohibited in the Agreement, are made an element of the contracted-for value. There is no "cover" available to Covad. Therefore, with respect to the damage claims upon which the Panel has concluded that damages should be awarded to Covad in the Interim Award, none of the asserted bases for limiting Pacific's liability suffices to impose a limitation.

23. Section 26 forecloses damages on the basis of lost profits under the Agreement. Covad has argued that Section 1668 of the California Civil Code dictates that Pacific cannot be allowed to shield itself by contract from its own willful misconduct. Section 1668 provides:

> All contracts which have for their object, directly or indirectly, to exempt anyone from responsibility for his own fraud, or willful injury to the person or property of another, or violation of law, whether willful or negligent, are against the policy of the law.

"Section 1668 reflects the policy of this state to look with disfavor upon those who attempt to contract away their legal liability to others for the commission of torts." *Blankenheim v. E.F. Hutton & Co.*, 217 Cal. App. 3d 1463, 1471. However, in *Freeman & Mills, Inc. v. Belcher Oil*, 11 Cal. 4th 85 (1995) the California Supreme Court severely narrowed the theory of tortious breach of contract. Breach of the implied covenant of good faith and fair dealing is a contract breach, subject to limitations of damages. *Foley v. Interactive Data Corp.*, 47 Cal. 3d 654 (1988). The Agreement is not a contract of adhesion; the rationale of *Tunkl v. Regents of the Univ. of California*, 60 Cal 2d 92 (1963) does not apply.

Limitation of Liability With Respect To Claims Under the Telecommunications Act

24. The application of Section 26 to Covad's claims for violation of Sections 251 (b) and (c) of the Telecommunications Act is addressed in the separate Interim Opinion With Respect to Covad's Telecommunications Act Claims.

Liquidated Damages

25. Pacific contends that Covad may not recover the liquidated damages prescribed in Appendix C because Covad did not provide Pacific with forecasts. However, the record contains numerous forecasts provided to Pacific. [Ex. 61; Ex. 222] Pacific was asked what type of forecasts it needed, and there is no evidence of a response from Pacific pointing either to quality or quantity shortcomings. Neither side offered definitive testimony on whether Pacific's account manager provided monthly service reports to Covad, or whether Covad gave the account manager forecasts. Pacific failed to meet its burden of establishing this defense to liquidated damages. Covad is entitled to liquidated damages as more fully explicated in paragraphs 32 and 33.

REMEDIES

Injunction

26. According to Covad's general counsel, Covad requires an injunction to complete its buildout and "infill" those areas now preventing full coverage in its selected service areas. Covad has asked for an injunction requiring Pacific to provide collocation services in set time limits, with monetary penalties for failure.

27. Pacific has demonstrated that it has made improvements in on-time provision of service. Pacific employees appearing before the panel seemed, with few exceptions, dedicated to solving the problems that have admittedly delayed their response to the demands of the Act. Pacific has represented to the panel that "Covad's problems with Pacific are a thing of the past" and that it is now "current on meeting its collocation installation period (120 days) with appropriate transport." [Pacific Brief at 6] Pacific shall provide loops and transport strictly in accordance with the terms of the Agreement and the relevant tariffs. The panel declines to order the other provisions of the injunction sought by Covad.

28. In the present circumstance, Pacific remains the sole arbiter of whether physical collocation space is available in a particular CO. There is no mechanism for Covad to test Pacific's decisions and to be assured that it will be afforded space, according to its priority of application, where space is available. (Pacific's offer of third party inspection, aptly described by Covad as "no discovery, nonbinding, you pay," does not pass the 'just and reasonable" test.) On the record here, that is not a tolerable situation. Therefore, Pacific is hereby ordered to allow physical inspection of (1) all COs for which Covad has made application for physical collocation and has been denied on the basis of lack of space; (2) all COs for which Covad in the future makes application for physical collocation. Pacific must grant a request for inspection within 10 business days of receiving a written request from Covad. Covad's representative for purposes of inspection shall be a licensed engineer, and Covad and Pacific shall sign a reciprocal non-disclosure agreement to safeguard the confidentiality of proprietary information. Within 5 business days of the inspection, Pacific shall inform Covad whether space is available in the inspected CO. If Covad disagrees with Pacific's decision it may, at its option, pursue the matter before the CPUC or present the issue to the panel, either through written evidentiary submissions or physical inspection. If the panel agrees with Pacific's determination, Covad shall pay for the fees and expenses of the panel in such hearing or inspection. If the panel overrules Pacific's determination, Pacific shall pay the fees and expenses of the panel.

29. In addition, the panel finds that virtual collocation is a disadvantageous method of collocation and may be offered only as provided in the Agreement. [See Ex. 177, Attachment C; Section 11.5]. Pacific has indicated a recent willingness to consider, in addition to 10' by 10' collocation cages, other more flexible forms of physical collocation. Accordingly, in COs where collocation in the arbitrary 10' by 10' cage is not possible, and space is available either for a smaller cage that meets Covad's needs or for a CEV, Pacific is ordered to make those options available to Covad.

30. The panel understands that rules have been proposed addressing space and collocations issues. If the proposed CPUC procedures are adopted, Pacific will no longer be the "sole arbiter," and many of the procedures the panel has ordered will be available, albeit on a different time schedule. However, in light of the panel's findings regarding Pacific's bad faith in connection with Covad's requests for collocation, the proposed rules do not appear to offer Covad an adequate remedy, particularly for past denials. Covad has invoked the commission-approved arbitration provisions in the Agreement for relief from Pacific's violations of the Agreement regarding collocation, and the panel has afforded such relief. Covad is given the option to pursue the injunctive relief awarded by the panel or to rely on the new rules, when and if they are adopted.

31. While the panel declines to order Pacific to provide facilities to Covad in the intervals shorter than those set forth in the Agreement, or to order liquidated damages for late delivery, Pacific may not invoice Covad for transport or loops or for the second 50% of recurring and non-recurring cage charges until collocation services associated with those invoices are fully turned up and functional.

Liquidated Damages

32. Pacific owes Covad liquidated damages. The parties are ordered to meet to attempt to reach agreement on the amount owing within 15 days of this Interim Award. In addition, the parties are ordered to structure a workable framework for resolving ongoing issues of liquidated damages. The framework should include a forecasting format to be filled in and submitted by Covad on a clear and reasonable timetable. In the event that the parties are unable to agree on a liquidated damages calculation, or a framework, or both, the matter shall be submitted to the panel by each party presenting its final calculation and/or framework, accompanied by whatever backup the party deems appropriate. The panel will select one calculation and/or framework. The opposing party shall pay reasonable attorneys fees and the fees and expenses of the panel related to the post Interim Award activities regarding liquidated damages. The panel's decision with respect to liquidated damages will be set forth in the Final Award with respect to Covad's claims for breach of the Agreement.

33. The panel is confident that the parties will be able to work out reasonable accommodations for their mutual needs of timeliness, security and scheduling with respect to inspection of COs and determination of liquidated damages. However, if they are unable to do so, the case administrator will convene a teleconference with the parties and the chair of the panel within 48 hours at the request of either party.

Damages

34. Covad is awarded direct damages for ILEC Resolution Group expenses and for extra labor and truck roll expenses, to be brought current to the date of this Interim Award and provided to the panel, to be set forth in the Final Award with respect to the contract claims. Covad shall file and serve its further evidence by December 2, 1998, and

Pacific shall have until December 9, 1998 to file and serve any opposing evidence. Covad may reply by December 14, 1998.

35. The fees and expenses of the American Arbitration Association (as reported to the panel by the Association) and the compensation and expenses of the arbitrators shall be set out in the Final Award with respect to the contract claims and shall be borne by Pacific.

36. Covad is awarded its reasonable attorneys' fees and costs in connection with its claims for breach of the Interconnection Agreement. Covad shall submit a claim for attorneys' fees to the panel and to Pacific's counsel, with all appropriate backup records (i.e., time sheets, billings and payment records) by December 2, 1998. Pacific shall have until December 9, 1998 to submit to the panel and to Covad's counsel objections to Covad's claim. Covad may reply to the objections by December 14, 1998. The submission shall be treated as confidential. If either party requests a hearing for argument or evidentiary purposes regarding the claim for attorneys' fees and costs or the damages to be awarded pursuant to paragraph 34 of this Opinion, the hearing must be requested no later than December 9, 1998, in writing to the case administrator. The award of attorneys' fees shall be set forth in the Final Award with respect to breach of the Agreement.

37. This Opinion is an Interim Opinion. The further determinations to be made at any further hearing or based on written submissions shall be embodied in a Final Award that shall also incorporate the contents of this Interim Opinion. It is not intended that this Interim Opinion be subject to correction or review pursuant to the California or United States Arbitration Acts.

Dated: November 24, 1998

Lois W. Abraham

Richard Chernick

Francis O. Spalding